

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE EASTERN DISTRICT OF TEXAS

3 MARSHALL DIVISION

4 PATTY BEALL, ET AL. ) (

5 ) ( CIVIL DOCKET NO.

6 ) ( 2:08-CV-422-TJW

7 VS. ) ( MARSHALL, TEXAS

8 ) (

9 TYLER TECHNOLOGIES, INC., ) ( JUNE 19, 2009

10 ET AL. ) ( 9:30 A.M.

11 CLASS CERTIFICATION HEARING

12 BEFORE THE HONORABLE JUDGE T. JOHN WARD

13 UNITED STATES DISTRICT JUDGE

14

15 APPEARANCES:

16

17 FOR THE PLAINTIFFS: (See Attorney Sign-In Sheet)

18

19 FOR THE DEFENDANTS: (See Attorney Sign-In Sheet)

20

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24

25 (Proceedings recorded by mechanical stenography,

transcript produced on a CAT system.)

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4 June 19, 2009

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1 COURT SECURITY OFFICER: All rise.

2 THE COURT: Please be seated.

3 All right. Class cert hearing in this

4 collective action -- collective action, Beall versus

5      Tyler Technologies, 2:08-CV-422.

6 What says the plaintiff?

7 MR. WREN: Your Honor, Jim Wren on behalf of  
8 plaintiffs, and we're ready to proceed.

11 MR. WREN: I think about 10 and at the very  
12 most 15 minutes, but probably closer to 10, Your Honor.

13 THE COURT: Okay. Defendant?

14 MR. DACUS: Your Honor, Darren Dacus on  
15 behalf of the defendants, Paulo McKeeby from the Morgan,  
16 Lewis & Bockius firm in Dallas, Your Honor, and we're  
17 ready to proceed.

18 THE COURT: How long you think you need?

22 THE COURT: Okay. We'll proceed. Hear from  
23 the plaintiff first.

24 MR. WREN: Thank you, Your Honor.

25 THE COURT: Why don't you do it from the

1 podium, if you would, please, sir?

2 MR. WREN: Yes, sir.

3 THE COURT: That screen should -- small  
4 screen should have the same thing that's on the big  
5 screen.

6 MR. WREN: Great. Good morning, as I said,  
7 I will be brief, Your Honor. As you know, and I know  
8 you are certainly aware, I've reviewed your opinion in  
9 the Allen versus McWane case and others.

10 As you know, Congress has stated its intent  
11 that employees who have been properly denied overtime  
12 should have the opportunity to proceed collectively.  
13 And as you have noted in Allen versus McWane, the Court  
14 should foreclose that right to proceed collectively only  
15 if the action relates to specific circumstances that are  
16 personal to the plaintiff rather than to generally  
17 applicable policy or practice. And as the Supreme Court  
18 has said, the collective benefit depends on the  
19 employees receiving accurate and timely notice.

20 So, Your Honor, I want to focus very briefly  
21 on what we know here at this preliminary notice stage.  
22 First of all, turning to Tyler Technologies' own  
23 handbook, Tyler Technologies personnel handbook.

24 On Page 1, the handbook -- Tyler  
25 Technologies states that an individual Tyler company --

1 and Tyler is made up of a number of subsidiary  
2 components now, all merged into one company with  
3 divisions, but as the handbook says, an individual Tyler  
4 company may have additional policies that supplement  
5 this handbook, but if there is a difference between this  
6 handbook and individual company policies, the handbook  
7 shall control unless a policy specific to an individual  
8 company has been approved by Tyler. In other words,  
9 Tyler corporate officer retains control, as you would  
10 expect.

11                   Turning to Page 9 of the handbook, there  
12 is -- getting into the discussion of personnel. The  
13 human resources department at Tyler's corporate office  
14 is responsible for handling employee records,  
15 interpretation of policies, employee relations,  
16 benefits, and related personnel administration functions  
17 at Tyler. This is important, Your Honor, because the  
18 argument that has been made by the defendants is that  
19 they are in my -- I'm using my words, not theirs, but  
20 that they are a conglomeration of different companies,  
21 subsidiaries operating autonomously, independently, and  
22 that is, as I'm going to be walking through, is simply  
23 not the case from everything that we have had made  
24 available to us and have proceeded to the Court at this  
25 point in time.

1 Going to the -- to Page 24 of the handbook,  
2 specific to the question of review of personnel policies  
3 including personnel compensation, we have this  
4 statement: "Tyler conducts" -- talking about Tyler  
5 corporation -- "conducts individual compensation reviews  
6 annually on or about each anniversary date following the  
7 annual performance review. Wage or salary increases are  
8 not guaranteed; rather, they are based on individual  
9 performance. Wage or salary increases typically are  
10 effective in the pay period ending after the dates they  
11 are granted; however, increases may be retroactive at  
12 the discretion of the manager."

19 We have seen from Mr. Lynn Moore, who's here  
20 today, executive vice president of Tyler Technologies,  
21 his own declaration speaks to the fact that Tyler, for a  
22 period of time prior to 2005, after acquiring other  
23 companies, would allow them to operate and did allow  
24 them to operate autonomously as wholly owned  
25 subsidiaries, but that that changed in 2005.

1                   In 2005, there was a merger of all of these  
2 subsidiary companies into Tyler Technologies into the  
3 one single corporation and that from that point forward  
4 as additional companies have been acquired. They have  
5 all continued then to be merged into Tyler Technologies  
6 as one single company.

7                   The declarations -- and, Your Honor, we have  
8 provided as part of our pleadings in this preliminary --  
9 for this preliminary certification and notice, we have  
10 provided 20 declarations. They come from nine different  
11 locations, across five different states, from each of  
12 the five categories of technical support personnel that  
13 are -- for which we are seeking the right to proceed  
14 collectively because they are all similarly situated.

15                  These 20 different employees' declarations  
16 all show that the -- there is a uniform practice, as  
17 would be expected, where there is the ultimate direction  
18 of personnel policies by corporate headquarters, that  
19 there is no indication from those 20 declarations -- and  
20 I'll speak in a moment to some of the managerial  
21 declarations -- there is no indication of any sort of  
22 individualized review to determine on an individualized  
23 basis whether there is some basis to make them either  
24 exempt or nonexempt as an individual separate and apart  
25 from how they are being handled as a group.

1                   These positions are all being handled  
2 together, being addressed together for exemption or  
3 nonexemption purposes, which points to the very fact  
4 that they are similarly situated. There is no payment  
5 of overtime of any of these people, despite working, as  
6 we've shown through these 20 declarations, in many cases  
7 working 60, 70, 80, sometimes 90-hour weeks, no overtime  
8 compensation.

9                   Furthermore, as I've said, not only is there  
10 no individualized analysis to see whether on an  
11 individual as opposed to a group basis these employees  
12 should be treated any differently from the group. In  
13 fact, Your Honor, the declarations have shown that there  
14 are no time sheets kept. There used to be, but those  
15 have been discontinued at the direction Tyler corporate.

16                   Across the board, there -- the  
17 discontinuance of time sheets has, in fact, taken away  
18 the potential for any sort of individualized  
19 determination where it could be done on a record-kept  
20 basis. This is, as the affidavit of Kelly Ainsworth  
21 points out, done -- this discontinuation of keeping any  
22 sort of time sheets that would allow individualized  
23 determination has been directed by Tyler corporate.

24                   We further know from Mr. Ainsworth's  
25 declaration who -- and Mr. Ainsworth, former management

1 with Tyler Technologies, that Tyler Technologies, at  
2 least within -- after acquiring EDP in Longview and  
3 substituting in its management in place of the EDP  
4 management, has been treating all of the employees, with  
5 exception of receptionist, as exempt, that the  
6 compensation issues are handled by Tyler Technologies  
7 out of their Maine corporate headquarters in Maine, not  
8 on any sort of individualized or autonomous basis, that  
9 from his knowledge, all the companies are brought into  
10 Tyler divisions and do not work -- do work on any sort  
11 of autonomous basis.

12 Your Honor, all this points to the fact that  
13 these technical support personnel in these five  
14 categories, implementation employees, customer support  
15 employees, engineers, quality assurance employees, and  
16 sales employees, all of these in -- in these five  
17 varieties of technical support, these folks are all  
18 being treated on a uniform basis, despite whatever  
19 differences there may be in individual titles, in  
20 individual job duties.

21 The basic -- as I understand the essential  
22 arguments of Tyler Technologies, they've really pointed  
23 to about three primary defenses. One being that these  
24 are multiple jobs with different duties and different  
25 pay, but in digging into those declarations, both the

1 employee declarations and the declarations of the  
2 management folks from Tyler Technologies, and by the  
3 way, they have provided no employee declarations, only  
4 management declarations, they can -- have not pointed to  
5 any difference in duties that is material to the  
6 question of whether we have FSLA violations, FSLA  
7 violations, and the differences are simply not material  
8 to determination for purposes of overtime -- entitlement  
9 to overtime pay. Whether there is a violation, mostly  
10 it goes to issues of damages.

11 They've raised the question of exemption,  
12 whether there should be some sort of determination of  
13 exemption here and whether that makes this appropriate  
14 for a collective action. Your Honor, as -- first of  
15 all, as I've pointed out, in the declarations, there is  
16 no indication of any sort of individualized  
17 determination. The very time sheets that we look to  
18 have been discontinued by Tyler specifically so that  
19 they would not have to account for the time that was  
20 being spent. And, furthermore, in their response, in  
21 their briefing, they point to a case, Big Lots, out of  
22 the Eastern District of Louisiana, talking about how  
23 exemptions could potentially make it an inappropriate  
24 case for collective determination.

25 And I want to be sure that the Court is

1 aware that as the Eastern District of Louisiana in a  
2 subsequent opinion, in the Cooperman versus ECU -- the  
3 ICF opinion which came out in November of 2008, of last  
4 year, and it's cited in our materials, as they  
5 acknowledge, the determination of exemptions is not  
6 appropriate for this stage. The reason it's not  
7 appropriate is because the burden of proof is on the  
8 defendant, that is, in essence, a merits determination,  
9 and to proceed to it now, particularly where there has  
10 been no showing of any event of any sort of indi --  
11 individualized determination of exemptions, is  
12 inappropriate to be determined as this preliminary  
13 stage. The only question at this stage is giving notice  
14 so that the employees may properly come forward.

15 Finally, Your Honor, the third argument that  
16 they basically raised is that these Tyler companies were  
17 required to operate autonomously, therefore, these  
18 employees should not be treated together, and that just  
19 simply doesn't track with the handbook, it does not  
20 track with the declaration of Mr. Lynn Moore or with the  
21 management declaration of Kelly Ainsworth. It does not  
22 appear to be a -- an appropriate, accurate argument,  
23 Your Honor.

24 For all of these reasons, we ask that at  
25 this preliminary stage, the employees set forth in our

1 request, in our definition be provided with notice of  
2 this so that we can go forward with the discovery of the  
3 case.

4 And, Your Honor, thank you for the  
5 opportunity to address this.

6 THE COURT: Okay.

7 MR. MCKEEBY: Thank you, Your Honor.

8 THE COURT: Yes, sir.

9 MR. MCKEEBY: I want to make it clear that  
10 we're not asking the Court to decide the exemption issue  
11 here today or at this preliminary stage, but the  
12 exemption issue is relevant, and we have raised it in  
13 our answer and otherwise in our -- in our briefing on  
14 this issue because the issue is as to how this case is  
15 going to be decided.

16 And how this case is going to be decided on  
17 the exemption issue is that the Court and/or the jury is  
18 going to have to determine whether or not the  
19 representative testimony of a particular plaintiff can  
20 bind the other members of the -- of the class if the  
21 Court were to certify the class.

22 And essentially the argument would have to  
23 be, Your Honor, that they could take, for example, an  
24 implementation consultant out of Lubbock, Texas, have  
25 that person testify or pick any imple -- implementation

1 consultant randomly from one of Tyler's office and have  
2 that employee's testimony bind the rest of the people in  
3 the class. That testimony would be about what the  
4 employees's functions were, whether or not the  
5 employee's job was predominantly administrative, whether  
6 or not the employee's job involved discretion and  
7 judgment, all of the factors that the Courts and that  
8 regulations tell us to apply in determining whether or  
9 not in that case the administration -- the  
10 administrative exemption applies.

11 And, Your Honor, the reasons set forth in  
12 our brief, and I'll go over them more today, the  
13 evidence here demonstrates that the divergences in jobs  
14 are dramatic enough in this context so as to warrant a  
15 finding that the employees here that would sought to be  
16 certified are not, in fact, similarly situated.

17 Your Honor, we're familiar, as well, with  
18 the -- with the other cases from this Court that have  
19 involved requests to certify classes under Section 216,  
20 the McWane case, also the Nelson case and the Mimms  
21 case. And in the latter two, Your Honor is, I'm sure,  
22 aware, the Court did not certify a nationwide or as  
23 broad a class as the plaintiffs had sought in those two  
24 latter cases but rather certified a -- a more modest  
25 class.

1 And those -- all of those cases are  
2 critical, Your Honor, because they're distinct in this  
3 situation because of the type of cases that were  
4 involved. None of those cases were exemption cases  
5 where the Court and the jury is going to have to assess  
6 the particular duties of individual employees. Those  
7 cases were all donning and doffing cases or similar  
8 cases in which preliminary and post employment shift  
9 activities were -- were not paid for, and it was fairly  
10 easy in those cases for the Court to view, look, the  
11 testimony of one person as to what donning and doffing  
12 activities were to be engaged in prior to work would be  
13 sufficient, would be -- would bind the other  
14 representatives of the case because that testimony was  
15 indicative of a common practice for policy.

16 And here, we don't have that. We don't have  
17 that in -- you don't have that in the exemption case  
18 generally, and you particularly don't have that in this  
19 case where the testimony is going to have to be by  
20 nature anecdotal and not representative of a broad  
21 policy or practice.

22 Your Honor, I think the history of Tyler and  
23 its organization is absolutely relevant in this -- in  
24 this case. This is not a situation where you've got,  
25 for example, a large retail establishment that opens

1       offices throughout the country when they see a need.

2                    Tyler began operating in the software  
3       systems and services to governments, schools, and  
4       not-for-profit organizations in the mid-'90s and since  
5       that time has acquired entities across the country that  
6       have fit within that -- within that product niche, and  
7       it essentially has inherited the designations of those  
8       entities as to employment classifications, and they've  
9       allowed those -- those offices -- those 37 offices  
10      within Tyler to operate autonomously.

11                  And the handbook that was -- that was  
12      introduced by the plaintiffs in this case refers  
13      generally to policies but doesn't talk about employment  
14      classifications generally and doesn't talk about  
15      employment duties specifically of -- of the various  
16      employees that were sought to be certified.

17                  And essentially the argument, Your Honor,  
18      is -- is that because they were all treated as exempt,  
19      they're similarly situated and therefore they should  
20      be -- the class should be certified. But that is not  
21      the law. The law is very clear that you have to show  
22      more than simple -- the simple uniformity in how  
23      employees are treated to determine certification even at  
24      this stage. You have to look at the similarities of the  
25      job duties to determine whether or not class treatment

1       is fair, whether or not it's fair to allow one  
2       implementation consultant, for example, to testify and  
3       bind the rest of the group who fall into only that  
4       category. And, Your Honor, as plaintiffs acknowledge,  
5       that's only one of the five job classifications that the  
6       plaintiffs would seek to -- to have certified in this  
7       case.

8                   If this were simply -- when this case was  
9       originally filed, Your Honor, there were seven employees  
10      from the Longview office, which previously was EDP  
11      Enterprises, the other defendant in this case, and if  
12      they were the only -- if those were the only plaintiffs  
13      in this case and that was the extent of the  
14      certification that was sought, then we probably wouldn't  
15      oppose class certification, but when they've attempted  
16      to extend that beyond that single office to go  
17      nationwide to cover five different classifications of  
18      employees, technical support employees, implementation  
19      consultants, systems engineers, quality assurance  
20      employees, and now sales technicians, they go well  
21      beyond the four corners of their office here in  
22      Longview. And, moreover, Your Honor, we're talking  
23      about 37 different offices, we're talking about four  
24      functional work groups. Financial Management, which has  
25      20 different offices, we're talking about City

1     Solutions, which has eight offices, Courts and Justices,  
2     which has an office in Plano, and then the Property  
3     Appraisal and Tax Division, which has eight separate  
4     offices. So a total of 37 different offices across the  
5     country from Falmouth, Maine, to Renton, Washington,  
6     they would seek so certify based primarily on the  
7     declarations of the -- that they've submitted on behalf  
8     of their -- of their motion.

9                   And, Your Honor, if you look at those  
10    declarations a little bit more closely than -- than the  
11    plaintiffs would suggest, you see why they're not  
12    representative or why they're not sufficient at least at  
13    this stage to be representative of a -- of a class as  
14    broad as they would seek to certify.

15                  For example, one of the -- one of the  
16    subgroups of employees that -- that has been designated  
17    as quality assurance, they've got one declaration from a  
18    quality assurance employee, Your Honor, and that's from  
19    Plaintiff Pastor who was employed for a grand total of  
20    four months in -- in -- out of the software group in --  
21    in Plano. She says in her -- in her testimony, in her  
22    declaration that, again, she's a four-month employee,  
23    but nonetheless can testify that from my experience, the  
24    job title of Quality Assurance Analyst 2 was used by  
25    Tyler Technologies, Inc., to refer to a group of Tyler

1       Technologies, Inc., employees that share the same job  
2       position and the same job duties as I did. No -- no  
3       basis for how she knows that, no indication of what  
4       employees she's talking to. Has she traveled to other  
5       offices? You know, none of that is in the -- is in the  
6       declaration, Your Honor, and that's the exact same type  
7       of conclusory testimony that Courts have refused to  
8       accept, and even in this preliminary context when  
9       deciding certification.

10                   Similarly, Your Honor, this sales support  
11       position that's been referenced is supported by the lone  
12       declaration of a Plaintiff Locchi, that's at Exhibit S  
13       to plaintiff's motion, out of -- out of Lubbock, Texas,  
14       so, again, a single employee that has no knowledge or  
15       new foundation to testify that he can speak to the  
16       duties and responsibilities of other employees in  
17       different offices.

18                   Similar with respect to systems engineers,  
19       there's two declarations, both of whom come from  
20       employees who worked at EDP here in -- or rather in  
21       Longview, one of which, Your Honor, Plaintiff Maxwell,  
22       who was not even employed by the company as of September  
23       of 2007 when Tyler acquired the company, he was employed  
24       by EDP prior to the acquisition and yet his declaration  
25       is being offered to support certification of a

1        Tyler-wide class of, in that case, systems engineers.

2                With respect to implementation consultants,

3        Your Honor, they do have additional declarations, but,

4        Your Honor, I direct the Court respectfully to the -- to

5        the declaration of Chris Hepburn, who's in the company's

6        financial management group, also known as large cities,

7        and he talks about what -- what I think is going to be

8        critical to this case, is that implementation

9        consultants do different things depending on their

10        levels of experience, primarily depending on what office

11        they're working in, depending on the type of product

12        that they -- that they provide, and that's the case both

13        with implementation consultants and also with respect to

14        customer support employees.

15                For example, the support employees that work

16        in Lubbock, Texas, and this comes from the declaration

17        of Dane Womble, fall into different categories.

18        Frontline support employees who deal primarily with the

19        customers on a direct level over the telephone, advisors

20        who deal with more complicated issues and assist and --

21        and not so much -- not so important that it's just more

22        complicated, but the way they do their job is different.

23        They do their job differently as they're not doing as

24        much interaction with customers. They're advising these

25        more -- more junior typically frontline supervisors in

1 handling particular problems. And then you have also a  
2 group of team leaders that fall within the customer  
3 support category, at least in the Lubbock office, who  
4 actually have input on -- in personnel decisions and  
5 lead these groups of other employees. And so all --  
6 even within the particular office these employees are  
7 doing different things. To suggest that you can  
8 randomly pick one of these employees to testify, "Here's  
9 my job," and have that testimony bind the other  
10 employees even within this office is -- is not fair and  
11 not consistent with the jurisprudence on -- on this  
12 issue.

13 Moreover, Your Honor, as you move from  
14 office to office, you're going to find significant  
15 differences based primarily on the size of the office.  
16 For example, again, back to Mr. Womble's declaration, he  
17 talks about the Lubbock office where there's a large  
18 number of employees in, for example, the implementation  
19 consultant position where they're highly specialized,  
20 and they can afford to be because of the size of the  
21 office. Whereas, in other offices in Ames and Sioux  
22 Falls over which he has supervisory responsibility,  
23 which involve much smaller operations, less employees,  
24 the implementation consultants in those positions have  
25 to pretty much do everything. They're not as highly

1       specialized. And so, again, the job duties are  
2       significantly different.

3                   And even looking -- as we set forth in our  
4       brief, even looking at the declarations of the  
5       plaintiffs themselves, there are significant differences  
6       that emanate. For example, in the context of the -- of  
7       the customer support employees, Plaintiff Beall says  
8       that she worked exclusively doing remote troubleshooting  
9       and answered customer questions over the telephone,  
10      whereas the other employees, for example, Plaintiff  
11     Tullos, again, only worked for the company for a few  
12      months, says that she performed all of those functions  
13      plus spent 25 percent of her time doing configuration  
14      work. Whereas another customer support employment,  
15     Plaintiff Bonner, says she also assisted in client  
16      training activities.

17                  And, again, the point is not to say that,  
18     "Well, that makes some of these employees and some of  
19     these -- exempt and others nonexempt." The point is  
20     that they're doing different things, and so it would be  
21     fundamentally unfair and not what a 216(b) collective  
22     action is supposed to be, to have one employee sit up on  
23     the stand and tell the jury, "Here's what I do. Decide  
24     whether or not I'm exempt or nonexempt," and that --  
25     that testimony bind to the remainder of the people

1       within that group because the jobs are so -- are so  
2       different in this context.

3                   And, Your Honor, we're not asking the Court  
4       to traverse new legal ground here. There are many cases  
5       cited on our brief and otherwise in which Courts have  
6       recognized the inherent difficulty in certifying a  
7       class, again, even at the preliminary stage when an  
8       exemption -- when the exemption issue is central to the  
9       case as opposed to, again, donning and doffing or  
10       tip-pooling or an age discrimination reduction in force  
11       where you have a centralized decisionmaking process  
12       where there is one policy that the Court can -- can  
13       assess and the jury can assess to determine liability.

14                  Here that can't be done because of the  
15       individualized inquiry nec -- necessitated by the -- the  
16       exemption analysis in determining whether or not these  
17       folks are -- are properly classified.

18                  Just a few examples, Your Honor. The -- the  
19       Safeco -- Mike v. Safeco case out of the district in  
20       Connecticut where the Court denied, again at the  
21       preliminary stage, that's 274 F. Supp. 216, denied  
22       certification of the class because the Court determined  
23       that the administrative exemption requires examination  
24       of individual day-to-day tasks and would be inconsistent  
25       with collective action.

17 THE COURT: Is there any suggestion that  
18 y'all have more than one employee handbook that  
19

20 MR. MCKEEBY: We have one employee handbook,  
21 Your Honor, but if you look at the policies that -- that  
22 are contained in the handbook are very general and  
23 ultimately they're not particularly relevant to what's  
24 to be determined in this case. They don't deal with job  
25 duties. I mean, not for example, I mean, that is the

1 issue.

2 What are these -- what are these employees  
3 doing on a day-to-day basis? And the handbook -- the  
4 fact that there might be a centralized human resources  
5 department and the fact that the handbook might apply to  
6 all employees with respect to, for example, a sexual  
7 harassment policy or when performance reviews are to be  
8 given is of no relevance of what's to be determined in  
9 this case.

10 What's to be determined in this case are  
11 what do the employees do and whether or not it's fair  
12 and consistent with 216(b) to allow an employee randomly  
13 selected in one of these particular job classifications  
14 to testify about his or her duties and functions and  
15 have that bind the other -- the other members of the --  
16 of what would be the class if -- if what we think would  
17 be the incorrect certification of it.

18 So, no, there's no other handbook, but the  
19 handbook I think respectfully is a red herring in the  
20 sense that it doesn't relate to what's ultimately at  
21 issue in this -- in this case. This case is going to be  
22 decided not by the handbook but by what the employees  
23 testify and what we can show as to what their duties are  
24 and whether or not those duties are sufficient that they  
25 be classified as -- as exempt employees based on their

1 exercise of judgment and discretion, based on their  
2 exercise of administrative as opposed to production  
3 roles, and you're going to find none of that in the  
4 handbook, and the plaintiffs haven't directed the Court  
5 to anything in the handbook that relates -- that relates  
6 to those -- to those issues.

7 Your Honor, in closing, we recognize that  
8 the easy approach in this case might be to certify the  
9 class based on -- based on the standard and the  
10 discretion that's yielded in the Court, but -- but it's  
11 a discretion that should be used cautiously. And, you  
12 know, the Big Lots case is -- is representative because  
13 it shows what can happen in these kinds of cases when  
14 this -- the analysis at this stage is not as thorough as  
15 it -- as it maybe could be, quite frankly, in that you  
16 certify the class continually and then later on  
17 decertify it. And, Your Honor, our office has -- has a  
18 case for Dollar General, which we drove by on the -- on  
19 the way here, where -- out of -- out of Alabama where  
20 the Court conditionally certified a class and then later  
21 decertified it. And I don't think any of those cases  
22 are in the Eastern District, but after the  
23 decertification, there are literally 1,600 different  
24 cases floating around the federal district courts, 60 of  
25 them in the Northern -- I think 60 of them in the

1       Northern District of Dallas, and that's what happens  
2       when you certify a case at this preliminary stage, allow  
3       notice to go out to a volume of parties who currently  
4       don't have any idea or any thought that they're going to  
5       be in federal court, and then say later on when there is  
6       more evidence in front of the -- in front of the Court,  
7       "No, certification is improper."

8                   That's the -- that's the ramifications of  
9       that type of analysis, and that's why -- that's why the  
10      cases that I've cited to the Courts today, the Courts  
11      have looked at this situation in the exemption context  
12      in particular, and, again, I want to emphasize how  
13      different the proof in this type of case is to the  
14      donning -- in the donning and doffing cases, age  
15      discrimination cases, other types of cases where  
16      collective actions may be appropriate because there is a  
17      policy.

18                   What is going to be in front of the jury is  
19      whether or not it was a violation of the Fair Labor  
20      Standards Act to require employees to don whatever  
21      particular protective gear is at issue in a particular  
22      donning and doffing case. And that type of testimony is  
23      going to be much more likely in general here, but much  
24      more likely to be representative than this type of  
25      exemption case where each employee is going to have to

1 testify about his or her job duties.

2 And Tyler, in its defense of the case, is  
3 going to have to elicit testimony about individual job  
4 responsibilities from different -- different plaintiffs.

5 The testimony and the evidence is going to be by its  
6 very nature anecdotal, not policy or practice-wide as  
7 you see in the cases in which certification is granted.

8 Thank you, Your Honor.

9 THE COURT: Well, you may be right,  
10 Counselor, you know, but that -- there may be defenses  
11 that I may change my mind, but I'm going to  
12 conditionally certify the purpose of giving notice.

13 Now, where are y'all on the notice? What --  
14 what problems do you have with the notice?

15 MR. MCKEEBY: Well, we've raised some  
16 problems in our briefing. We haven't really had any  
17 conference about it, but I might suggest that we -- we  
18 do so. It's --

19 THE COURT: Well --

20 MR. MCKEEBY: You know, I can delineate the  
21 problems that I have with the proposal.

22 THE COURT: Well, I notice some of them. I  
23 think you ought to try to work it out. Now, here the  
24 thing about it, if you've got e-mail addresses, I mean,  
25 I don't see why to the extent you've got them they ought

1 to be included in what you furnish to the plaintiffs.

2 As to the wording of the notice, I don't  
3 want my signature on the notice, and I never have had my  
4 signature on the notice, and it shouldn't be from me.

5 It -- if you follow what I've done previously, I think  
6 you ought to be able to work it out, but I want to give  
7 you a time frame to either -- how long do y'all think  
8 you need to either -- to submit to me what you will  
9 agree upon, and if you can't agree upon it, submit what  
10 you can't agree upon so I can get one done.

11 MR. MCKEEBY: 10 days.

12 MS. BAGLEY: That sounds fair.

13 THE COURT: Okay. If y'all do that, then  
14 we'll get it done, and I think the defendant is -- you  
15 object to the way it's worded about the date of the  
16 order, or do you want to -- how do you want to -- what's  
17 the problem there? Do y'all think y'all can work that  
18 out?

19 MR. MCKEEBY: I think -- I suspect we can  
20 work it out, but I think it should be as to the -- as to  
21 the date as opposed to saying 90 days from an  
22 unspecified date.

23 THE COURT: I don't have any problem with  
24 that.

25 MS. BAGLEY: I don't either.

1                   THE COURT: Y'all can work that out.

2                   MR. MCKEEBY: Yeah, I -- I suspect that --

3                   THE COURT: If y'all can get that to me

4 within 10 days, then we'll get it done.

5                   MS. BAGLEY: Thank you, Your Honor.

6                   MR. MCKEEBY: Thank you, Your Honor.

7                   MR. WREN: Thank you, Your Honor.

8                   COURT SECURITY OFFICER: All rise.

9                   (Hearing concluded.)

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1 CERTIFICATION

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3 I HEREBY CERTIFY that the foregoing is a  
4 true and correct transcript from the stenographic notes  
5 of the proceedings in the above-entitled matter to the  
6 best of my ability.

7

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10 SHELLY HOLMES Date  
11 Deputy Official Reporter  
12 State of Texas No.: 7804  
13 Expiration Date: 12/31/10

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